Supreme Court, U.S.
FILED
JUL 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

87-29

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SABAH SENAWI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RICHARD C. KRAUS
FARHAT, STORY & KRAUS, P.C.
1111 Michigan Avenue
East Lansing, MI 48823
517-351-3700
Counsel of Record

LEO A. FARHAT
RICHARD C. KRAUS
FARHAT, STORY & KRAUS, P.C.
Attorneys for Petitioner

July 2, 1987

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

I. Whether the rebuttable presumption of prejudice arising from a showing that the jury considered extrinsic evidence concerning a material issue in violation of a defendant's Sixth Amendment rights to counsel, confrontation and cross-examination, recognized in *Mattox v United States*, 146 US 140, 13 S Ct 50, 36 L Ed 917 (1892) and *Remmer v United States*, 347 US 227, 74 S Ct 450, 98 L Ed 654 (1954), remains valid after *Smith v Phillips*, 455 US 209, 102 S Ct 940, 71 L Ed 2d 78 (1982)?

II. Whether the Sixth Circuit rule that a defendant must prove actual prejudice resulting from juror consideration of extrinsic evidence, without the aid of a rebuttable presumption, conflicts with the precedent of this Court and the other circuits?

III. Whether the jury's attempted burning of a ceiling tile as an experiment during deliberations to test its combustibility required an evidentiary hearing to determine the prejudicial effect on the jury's evaluation of conflicting factual and opinion testimony about the fire?

IV. Whether the denial of an evidentiary hearing and the prejudice presumed from the violations of petitioner's rights to counsel, confrontation and cross-examination require a new trial?

V. Whether the material evidence discovered after trial concerning the origin and spread of the fire, the intentional mishandling of a crucial exhibit, the biased investigation, and the failure to disclose exculpatory witness statements requires a new trial?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 1

STATEMENT OF THE CASE 1

Proceedings in United States District Court for the Eastern District of Michigan 2

Proceedings in the Sixth Circuit Court of Appeals 2

REASONS FOR GRANTING THE WRIT 6

I. THE SIXTH CIRCUIT'S REFUSAL TO APPLY A PRESUMPTION OF PREJUDICE UPON A SHOWING THAT THE JURY CONSIDERED EXTRINSIC EVIDENCE CONCERNING A MATERIAL ISSUE CONFLICTS WITH THE PRECEDENT OF THIS COURT AND THE OTHER CIRCUITS 6

II. THE JURY'S EXPERIMENT ON THE CEILING TILE TO TEST ITS COMBUSTIBILITY RELATED TO MATERIAL ISSUES AND REQUIRED AN EVIDENTIARY HEARING. A NEW TRIAL IS REQUIRED TO REMEDY THE DENIAL OF THAT HEARING AND THE PREJUDICE PRESUMED FROM THE VIOLATIONS OF PETITIONER'S RIGHTS TO COUNSEL, CONFRONTATION AND CROSS-EXAMINATION 19

A. The trial court erroneously held that the jury's attempt to burn the ceiling tile did not constitute extrinsic evidence considered in violation of Petitioner's Sixth Amendment rights 19

B. A new trial is required due to the denial of an evidentiary hearing and the rebuttable presumption that the jury's experiment prejudiced Petitioner's Sixth Amendment rights. 22

III. THE MATERIAL EVIDENCE DISCOVERED AFTER TRIAL CONCERNING THE ORIGIN AND SPREAD OF THE FIRE, THE INTENTIONAL MISHANDLING OF A CRUCIAL EXHIBIT, THE BIASED INVESTIGATION, AND THE FAILURE TO DISCLOSE EXCULPATORY WITNESS STATEMENTS REQUIRES A NEW TRIAL 25

A. The Government failed to disclose exculpatory information regarding the observations made by the first firefighters to enter the building 25

B. The newly discovered testimony of Robert Anderson raises material questions about the alleged use of an accelerant in the fire and the opinion testimony of a fire marshal 27

CONCLUSION 30

APPENDIX 1a

Opinion of the Sixth Circuit Court of Appeals, April 6, 1987 ..... 1a

Order Denying Rehearing and Rehearing En Banc of the Sixth Circuit Court of Appeals, May 20, 1987 ..... 4a

Order Denying Motion for Inquiry Into Jury Conduct of the United States District Court for the Eastern District of Michigan, April 9, 1986 ..... 5a

Oral Opinion Denying Motion for Inquiry Into Jury Conduct of the United States District Court for the Eastern District of Michigan, March 19, 1986 ..... 7a

Oral Opinion Denying Second Motion for New Trial Based on Newly Discovered Evidence by the United States District Court for the Eastern District of Michigan, May 23, 1986 ..... 8a

Cases in Conflict with the Decisions of the Sixth Circuit 10a

Government Exhibit 50 (diagram) 12a

Testimony of Robert McClary Vol 8, Tr p 61-64 ..... 13a

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTION

Sixth Amendment 1-2

UNITED STATES CODE

18 USC § 844(i) 1, 2

18 USC § 1341 ..... 1, 2

28 USC § 1254(1) 1

28 USC § 2254(d) 11, 12

SUPREME COURT CASES

Chandler v Florida, 449 US 560, 101 S Ct 802, 66 L Ed 2d 740 (1981) 11, 12, 14

Chapman v California, 386 US 18, 87 S Ct 824, 17 L Ed 2d 705 (1967) 17

Dennis v United States, 339 US 162, 70 S Ct 519, 94 L Ed 734 (1950) 11, 12, 14, 16

Frazier v United States, 335 US 497, 69 S Ct 201, 93 L Ed 187 (1945) 14

Irvin v Dowd, 366 US 717, 81 S Ct 1639, 6 L Ed 2d 751 (1961) 14

Kimmelman v Morrison, US , 106 S Ct 2574, 91 L Ed 2d 305 (1986) 17

Mattox v United States, 146 US 140, 13 S Ct 50, 36 L Ed 917 (1892) 7, 8, 10, 13, 17, 18, 19

Remmer v United States, 347 US 227, 74 S Ct 450, 98 L Ed 654 (1954) 7, 8, 9, 10, 11, 13, 14, 16, 17, 18, 19

Rushen v Spain, 464 US 114, 104 S Ct 453, 78 L Ed 2d 267 (1983) 12, 13, 18, 25

Smith v Phillips, 455 US 209, 102 S Ct 940, 71 L Ed 2d 78 (1982) 7, 8, 9, 10, 11, 12, 13, 15, 19

Turner v Louisiana, 379 US 466, 85 S Ct 546, 13 L Ed 2d 424 (1965) 8, 13, 14

Table of Authorities Continued

Page

United States v Gagnon, 470 US 522, 105 S Ct 1482, 84 L Ed 2d 486 (1985) 13

United States v Tanner, - US - , - S Ct - , - L Ed 2d - (June 22, 1987) 9, 17

Wood v United States, 299 US 123, 57 S Ct 177, 81 L Ed 78 (1936) 14

CIRCUIT COURTS OF APPEAL

Bayramoglu v Estelle, 806 F2d 880 (9th Cir 1986) 10, 11a, 15

Brofford v Marshall, 751 F2d 845 (6th Cir 1985) 9

Durr v Cook, 589 F2d 891 (5th Cir 1979) 21

Gibson v Clanon, 633 F2d 851 (9th Cir 1980) *cert den'd* 450 US 1035, 101 S Ct 1749, 68 L Ed 2d 231 (1981) 11a

Government of Virgin Islands v Gereau, 523 F2d 140 (3d Cir 1975) 16

Haley v Blue Ridge Transfer Co, 802 F2d 1532 (4th Cir 1986) 8, 9, 10, 10a, 14, 15, 17

Hobson v Wilson, 737 F2d 1 (DC Cir 1984) *cert den'd* 105 S Ct 1843 (1985) 11a, 17

In re Beverly Hills Litigation, 695 F2d 207 (6th Cir 1982) *cert den'd* 461 US 929 (1983) 21

Lacy v Gabriel, 732 F2d 7 (1st Cir 1984) 10a

Llewellyn v Stynchcombe, 609 F2d 194 (5th Cir 1980) 10a

Miller v Estelle, 677 F2d 1080 (5th Cir 1982) 18

Miller v United States, 403 F2d 77 (2d Cir 1968) 18

Owen v Duckworth, 727 F2d 643 (7th Cir 1984) 10a, 18

Sher v Stoughton, 666 F2d 791 (2d Cir 1981) 10a

Table of Authorities Continued

Page

Stiles v Lawrie, 211 F2d 188 (6th Cir 1954) 10a

Stone v United States, 113 F2d 70 (6th Cir 1940) 10a

Sullivan v Fogg, 613 F2d 465 (2d Cir 1980) 9

United States ex rel Buckhana v Lane, 787 F2d 230 (7th Cir 1986) 11a

United States ex rel Owen v McMann, 435 F2d 813 (2d Cir 1970) *cert den'd* 402 US 906, 91 S Ct 1373, 28 L Ed 2d 646 (1971) 9

United States v Attell, 655 F2d 703 (5th Cir 1981) 24

United States v Avery, 717 F2d 1020 (6th Cir 1983) 20, 21

United States v Barnes, 747 F2d 246 (4th Cir 1984) 10a

United States v Bassler, 651 F2d 600 (8th Cir 1981) 18, 11a

United States v Beach, 296 F2d 153 (4th Cir 1961) 20, 22

United States v Bruscino, 662 F2d 450 (7th Cir 1981) 10a

United States v Caporale, 806 F2d 1487 (11th Cir 1986) 11a

United States v Coleman, 805 F2d 474 (3rd Cir 1986) 10, 10a

United States v Delaney, 732 F2d 639 (8th Cir 1984) 11a

United States v Ferguson, 486 F2d 968 (6th Cir 1973) 10a

United States v Flaherty, 668 F2d 566 (1st Cir 1981) 10a

United States v Greer, 620 F2d 1383 (10th Cir 1980) 11a

Table of Authorities Continued

Page

United States v Griffith, 756 F2d 1244 (6th Cir 1985) 7, 10, 2a

United States v Hawkins, 595 F2d 751 (DC Cir 1978) *cert den'd* 99 S Ct 2005 (1979) 20

United States v Heller, 785 F2d 1524 (11th Cir 1986) 11a

United States v Hephner, 410 F2d 930 (7th Cir 1969) 20

United States v Hill, 688 F2d 18 (6th Cir 1982) *cert den'd* 103 S Ct 498 16

United States v Hillard, 701 F2d 1052 (2d Cir) *cert den'd* 461 US 958, 103 S Ct 2431, 77 L Ed 2d 1318 (1983) 17, 10a

United States v Howard, 506 F2d 865 (5th Cir 1975) 10, 18

United States v Howard, 752 F2d 220 (6th Cir 1985) *cert den'd* 89 L Ed 2d 325 (1986) 10

United States v Ismail, 756 F2d 1253 (6th Cir 1985) 27

United States v Kum Seng Seo, 300 F2d 623 (3rd Cir 1962) 10a

United States v Leon, 739 F2d 885 (3rd Cir 1984) 10a

United States v Littlefield, 752 F2d 1429 (9th Cir 1985) 10, 11a

United States v Marx, 485 F2d 1179 (10th Cir 1973) 11a

United States v McKinney, 429 F2d 1019 (5th Cir 1970) 17

United States v Pennell, 737 F2d 521 (6th Cir 1984) *cert den'd* 469 US 1158, 105 S Ct 906, 83 L Ed 2d 921 (1985) 7, 9

United States v Perkins, 748 F2d 1519 (11th Cir 1984) 11a

Table of Authorities Continued

Page

United States v Phillips, 664 F2d 971 (5th Cir 1981)*cert den'd* 444 US 827, 100 S Ct 51, 62 L Ed 2d 1354 (1982) 16, 10a

United States v Rhodes, 556 F2d 599 (1st Cir 1977) 24

United States v Robinson, 756 F2d 56 (8th Cir 1985) 11a

United States v Spurlock, 811 F2d 1461 (11th Cir 1987) 11a

United States v Sublet, 644 F2d 737 (8th Cir 1981) 11a

United States v Thomas, 463 F2d 1061 (7th Cir 1972) 24

United States v Webster, 750 F2d 307 (5th Cir 1984) 10a

United States v Weiss, 752 F2d 777 (2d Cir 1985) 17, 10a

United States v Worthington, 698 F2d 820 (6th Cir 1983) 10a

DISTRICT COURT CASES

Simon v Kuhlman, 549 F Supp 1202 (SD NY 1982) 20

United States v Castello, 526 F Supp 847 (WD Tex 1981) 21

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit (Martin, Wellford and Nelson, C.J.) affirming Petitioner's conviction, was entered on April 6, 1987. [Appendix, p 1a] The order denying rehearing and rehearing *en banc*, was issued on May 20, 1987. [Appendix, p 4a]

The order of the United States District Court for the Eastern District of Michigan (Taylor, D.J.) denying the motions for inquiry into jury conduct and for new trial was entered on April 9, 1986. [Appendix, p 5a] The oral opinions denying the motion for inquiry into jury conduct on March 19 and denying the second motion for new trial on May 23, 1986, are reprinted *infra*. [Appendix, p 7a-8a]

JURISDICTION

Petitioner was convicted of violations of 18 USC § 844(i) and § 1341 in the Eastern District of Michigan. The judgment of sentence was entered on May 28, 1986.

An appeal was taken to the Sixth Circuit Court of Appeals. An opinion affirming the conviction was entered on April 6, 1987, and an order denying rehearing and rehearing *en banc* issued on May 20, 1987. An order staying issuance of the mandate until July 3, 1987, pending application to this Court for a writ of certiorari, was granted on June 3, 1987.

Jurisdiction is based upon 28 USC § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment provides that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by

law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

Proceedings in United States District Court for the Eastern District of Michigan

Petitioner was convicted of one count of maliciously damaging a building by fire, 18 USC § 844(i), and two counts of mail fraud, 18 USC § 1341, following a jury trial held in the Eastern District of Michigan before the Honorable Anna Diggs Taylor.[1] Petitioner was sentenced to a term of four years on the arson count and two concurrent terms of three years on the mail fraud counts. Petitioner was granted bond pending appeal in the amount of $150,000, cash or surety.

The indictment related to a fire which occurred at the Jefferson Food Center in Ecorse, Michigan, on June 11, 1984, and the subsequent filing of an insurance claim. The store was divided into a large display area and smaller storerooms.[2] The fire occurred along both sides of a partition wall between a storeroom and the display area of the market. The Government contended that Petitioner intentionally set four separate fires on the storeroom side of the partition wall. Expert witnesses presented by the Government testified that there were four separate, unrelated fire areas in the storeroom which indicated an incendiary origin. An arson investigator for the insurer gave his opinion that the fire appeared to have been caused

---

[1] The trial was held on January 21, 22, 23, 24, 28, and 29, February 11, 12, 13, 14, 18, and 19, 1986. The jury returned its verdict on February 21, 1986.

[2] A diagram of the store admitted as Government's Exhibit 50 is reproduced in the appendix, p 12a.

by a flammable liquid poured over four pallets in the storeroom and ignited. The Government's witnesses stated that the fire did not spread by burning along the ceiling and igniting separate areas as burning materials fell down.[3]

Petitioner presented an arson investigator whose opinion was that the fire was caused by an electrical fault in wiring extending from below the floor on the display side of the partition wall. The fault ignited combustible materials behind dairy coolers along the wall. The expert testified that the fire burned through the partition wall into the storeroom area, and that burning ceiling tiles spread the fire to three separate areas along the storeroom side of the partition wall.[4]

The conflicting expert testimony involves a principle of fire investigation known as "fall-down". Because heat rises, a fire will usually burn upwards along combustible materials. When heated gases and fire are blocked by the ceiling, they move out and away from the point of origin, along the ceiling surface. If the ceiling material is combustible, falling pieces can start new fires below. Many factors determine whether fall-down can spread a fire to separate areas, including the fire's intensity and duration, the building's construction, and the availability of oxygen and combustible material to fuel the fire.[5]

A key factor is the combustibility of the ceiling material. Petitioner's store had an acoustical tile ceiling suspended on a wooden grid and made of a pressed material known as Celotex. Defendant's Exhibit 70 was an undamaged ceiling tile from the market used during cross-examination

---

[3] Lewis, Vol 1, p 85-86; Silvani, Vol 2, p 146; Parker, Vol 2, p 201; Tackett, Vol 3, p 150, Vol 4, p 46-47, 116; McClary, Vol 7, p 29, 32, 73, 82.

[4] Nolan, Vol 10, p 53-56; Vol 11, p 54-59.

[5] Lewis, Vol 2, p 58-59; Tackett, Vol 3, p 170-175, Vol 4, p 114, 131-132; McClary, Vol 8, p 60-74; Nolan, Vol 11, p 41-45.

of Robert McClary, an arson investigator called by the Government.[6] McClary admitted that the ceiling material would "burn if enough fire is applied to it".

> Q. (Long pause.) In any event, sir, isn't it true that this type of material will burn very readily if you hold a match to it?
>
> A. I don't know that it would burn readily by holding a match to it. There'd probably have to be some sustained heat to ignite it.
>
> Q. You mean a match wouldn't be enough to ignite this type of tile, like that (snaps fingers)?
>
> A. I don't think so. You'd probably have to do it in a certain area, or a certain area or something, for a match to do it just like that (snaps fingers).

When questioned by the trial court about his reason for getting matches, defense counsel, in the jury's presence, said "I want to demonstrate to the jury through this witness how flammable that tile is. It will burn, almost like paper." The arson investigator stated that small pieces or edges might be burned by a match but the surface of the tile would not. The proposed burning of the tile did not take place.[7]

When the exhibits were retrieved from the jury room after verdict, the ceiling tile had a burn mark approximately 2" in diameter in the center of its surface. The mark indicated that one or more of the jurors had apparently attempted to ignite the tile in some manner.

On February 26, 1986, Petitioner filed a motion for an evidentiary hearing alleging that the jury had improperly conducted an experiment by attempting to burn the ceiling

---

[6] Parker, Vol 3, p 33-35; McClary, Vol 8, p 60.

[7] McClary's cross-examination on the subject [Vol 8, Tr 61-64] is reprinted at Appendix 13a.

tile in violation of his constitutional rights.[8] A timely motion for new trial and motion for judgment of acquittal were filed on February 27, 1986.[9]

The motions were heard and denied on March 19, 1986, without any evidentiary hearing. The trial court held that jury's burning of the tile was not extraneous evidence improperly intruding upon its deliberations. The court found that "the scorching of the tile does not bear on the central issue to this case" because the tile's flammability did not affect the issue of arson.[10]

A second motion for new trial based upon newly discovered evidence and a petition for reconsideration were filed on May 20, 1986.[11] The motion alleged the nondisclosure of two witness statements by the Government and the discovery of material testimony by three witnesses. The motions were heard and denied on May 23, 1986.[12] Petitioner was sentenced on May 23, 1986.[13] A notice of appeal was filed on June 6, 1986.

Proceedings in the Sixth Circuit Court of Appeals

The Sixth Circuit, by Judges Martin, Wellford and Nelson, affirmed Petitioner's conviction in a *per curiam* opinion issued on April 6, 1987. The court held that:

> In this case, we think that the district court may have erred but that the error, if any, does not

---

[8] R. 50: Motion for an Inquiry of Jury Conduct.

[9] R. 51; Motion for Judgment of Acquittal with Alternative Motion for New Trial.

[10] Appendix, p 7a.

[11] R. 70: Petition for Reconsideration of Motion for Judgment of Acquittal with Alternative Motion for New Trial and Second Motion for New Trial Based upon Newly Discovered Evidence.

[12] Appendix, p 8a.

[13] Tr 5/23/86, p 41; R. 72: Judgment and Commitment of Sentence.

> warrant a reversal. The appropriate procedure would have been to conduct a hearing based upon the filing of an affidavit by counsel to determine if extrinsic evidence was introduced, but defense counsel here failed to advise the district court sufficiently of any prejudice, and failed to show that the jury, in fact, conducted an experiment which he himself may have encouraged during his cross examination of Mr. McClary. Moreover, our independent review of the record indicates that even if the jury did conduct the experiment and this may have involved introduction of extraneous evidence, that evidence was harmless; Senawi's own witness explained that the experiment would not simulate the actual circumstances of the fire and would thus prove nothing. In any event, we cannot say that the district court abused it discretion in denying a mistrial for lack of prejudice to Senawi. We find no other terror in respect of the trial of Senawi. [Appendix, p 2a-3a]

A petition for rehearing and suggestion for rehearing en banc was denied by the Sixth Circuit on May 20, 1987. [Appendix, p 4a]

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT'S REFUSAL TO APPLY A PRESUMPTION OF PREJUDICE UPON A SHOWING THAT THE JURY CONSIDERED EXTRINSIC EVIDENCE CONCERNING A MATERIAL ISSUE CONFLICTS WITH THE PRECEDENT OF THIS COURT AND THE OTHER CIRCUITS.

The trial court found that the jury attempted to burn a ceiling tile during deliberations. The jury's experiment testing the tile's combustibility constituted extrinsic evi-

dence on a material issue which was considered in violation of Petitioner's Sixth Amendment rights.

Despite this established instance of juror misconduct, the trial court refused to hold an evidentiary hearing to inquire into the nature and circumstances of the jury's experiment. Petitioner was not accorded the rebuttable presumption of prejudice which arises when jury consideration of extrinsic evidence violates a criminal defendant's rights to counsel, confrontation and counsel. *Remmer* v *United States*, 347 US 227, 74 S Ct 450, 98 L Ed 654 (1954).

The Sixth Circuit held that the refusal to hold an evidentiary hearing and the jury's experiment were harmless error, applying rules drawn from *United States* v *Griffith*, 756 F2d 1244 (6th Cir 1985). In that case and *United States* v *Pennell*, 737 F2d 521 (6th Cir 1984) *cert den'd* 469 US 1158, 105 S Ct 906, 83 L Ed 2d 921 (1985), the Sixth Circuit holds that *Smith* v *Phillips*, 455 US 209, 102 S Ct 940, 71 L Ed 2d 78 (1982) overruled the established law recognizing a rebuttable presumption of prejudice from juror consideration of extraneous information or influences.

In a series of decisions, the Sixth Circuit has completely repudiated the holding in *Remmer* v *United States*, *supra*, 347 US at 229, 74 S Ct at 451, that "any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is . . . deemed presumptively prejudicial" and "the burden rests heavily upon the Government to establish . . . that such contact with the juror was harmless to the defendant." The presumption of prejudice, dating to *Mattox* v *United States*, 146 US 140, 13 S Ct 50, 36 L Ed 917 (1892), has been followed in all the circuits until the recent deviation by the Sixth Circuit.[14]

---

[14] A sampling of recent cases recognizing the *Remmer* presumption of prejudice is contained in Appendix, p 10a.

The conflict resulting from the Sixth Circuit's interpretation of *Phillips* warrants resolution by this Court. Issues relating to juror consideration of extraneous information affect the reliability and integrity of the fact finding process. The presumption of prejudice arising from the jury's failure "to decide the case solely on the evidence before it"[15] is an integral part of the remedy required under *Remmer* and has been responsibly applied in numerous cases.[16]

The Sixth Amendment rights of counsel, confrontation and cross-examination have a common purpose of ensuring that only reliable and relevant evidence properly admitted at trial is brought before a jury.[17] The overriding importance of that principle was recognized in *Mattox* v *United States*, 146 US 140, 150, 13 S Ct 50, 53, 36 L Ed 917 (1892).

> Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear.

In *Remmer* v *United States*, 347 US 227, 74 S Ct 450, 98 L Ed 654 (1954), the Court relied upon *Mattox* in holding that:

> In a criminal case, any private communication, contact, or tampering, directly or indirectly, with

---

[15] *Smith* v *Phillips*, 455 US 209, 217, 102 S Ct 940, 946, 71 L Ed 2d 78 (1982); *Turner* v *Louisiana*, 379 US 466, 472-473, 85 S Ct 546, 549-550, 13 L Ed 2d 424 (1965)

[16] There is a sizable number of reported cases dealing with a "variety of extrajudicial juror communications . . . as wide as human experience". *Haley* v *Blue Ridge Transfer Co*, 802 F2d 1532, 1538 n 10 (4th Cir 1986).

[17] *Turner* v *Louisiana*, 379 US 466, 472-473, 85 S Ct 546, 549-550, 13 L Ed 2d 424 (1965).

> a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial. ... The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant. *Id.*, 347 US at 229, 74 S Ct at 451.

The uniform rule of the circuits, until the Sixth Circuit's departure, has been that a defendant must establish that the jury was exposed to extraneous information or influences relating to material issues at trial.[18] This burden imposed upon a defendant eliminates many complaints of juror misconduct and protects the interests of finality and jury privacy.[19]

However, once a defendant meets this burden, the trial court is required to conduct an appropriate inquiry at which the Government has the burden to show that the jury's violation of the defendant's Sixth Amendment rights was harmless beyond a reasonable doubt. This harmless error analysis mandated by *Remmer* involves a rebuttable presumption that juror consideration of extrinsic evidence relating to a material issue is prejudicial.

This accepted rule was not questioned until the Sixth Circuit interpreted *Smith* v *Phillips*, 455 US 209, 102 S Ct 940, 71 L Ed 2d 78 (1982). In *United States* v *Pennell*, 737 F2d 521, 532 (6th Cir 1984) *cert den'd* 469 US 1158, 105 S Ct 906, 83 L Ed 2d 921 (1985), the court held that

---

[18] *Haley* v *Blue Ridge Transfer Co*, 802 F2d 1532, 1535-1538 (4th Cir 1986); *United States ex rel Owen* v *McCann*, 435 F2d 813, 818 (2d Cir 1970) *cert denied* 402 US 906, 91 S Ct 1373, 28 L Ed 2d 646 (1971); *Brofford* v *Marshall*, 751 F2d 845, 853-854 (6th Cir 1985).

[19] There is an understandable judicial reluctance to intrude into jury deliberations and upset verdicts. *United States* v *Tanner*, - US - , - S Ct - , - L Ed 2d - (June 22, 1987); *Sullivan* v *Fogg*, 613 F2d 465, 467 (2d Cir 1980).

the defendant failed to prove actual prejudice resulting from anonymous phone calls to five jurors.

> In light of *Phillips*, the burden of proof rests upon a defendant to demonstrate that unauthorized communications with jurors resulted in actual juror partiality. Prejudice is not to be presumed.

The Sixth Circuit held that *Phillips* "worked a substantive change in the law . . . relating to unauthorized communications with jurors [so] that the presumptive prejudice standard . . . no longer governs". *Id.* at 532, n 10.

This interpretation was extended in *United States* v *Griffith*, 756 F2d 1244, 1252 (6th Cir 1985) to juror consideration of a dictionary definition of a legal term. The court specifically distinguished cases involving "juror's use of or exposure to extraneous matter". In Petitioner's case, the Sixth Circuit applied the rule to juror consideration of extrinsic evidence, completing the repudiation of the *Remmer* presumption.

This view of *Phillips* has been rejected by the Fourth and Ninth Circuits. *United States* v *Littlefield*, 752 F2d 1429, 1431 (9th Cir 1985); *Bayramoglu* v *Estelle*, 806 F2d 880, 887-888 (9th Cir 1986); *Haley* v *Blue Ridge Transfer Co*, 802 F2d 1532, 1535-1538 (4th Cir 1986). The remaining circuits continue to apply the presumption of prejudice mandated in *Remmer*, but have not expressly ruled on the effect of *Phillips*.[21]

Petitioner contends that the presumption of prejudice established in *Mattox* and *Remmer* is still a vital and in-

---

[21] *United States* v *Coleman*, 805 F2d 474 (3rd Cir 1986) (declining to decide effect of *Phillips* on presumption of prejudice due to finding of harmless error); *United States* v *Howard*, 752 F2d 220 (6th Cir 1985) *cert den'd* 89 L Ed 2d 325 (1986) (declining to decide issue). The cases listed in Appendix, p 10a continue to apply the presumption of prejudice.

tegral aspect of the remedy for violations of the rights of counsel, confrontation and cross-examination resulting from juror consideration of extrinsic evidence related to a material issue.

In *Smith* v *Phillips*, 455 US 209, 102 S Ct 940, 71 L Ed 2d 78 (1982), the Court refused to imply bias as a matter of law in a habeas corpus proceeding. During trial, a juror applied for employment with the prosecutor's office. At an evidentiary hearing, the state court found insufficient evidence that the juror was actually biased. This Court held that the state court finding was entitled to deference under 28 USC § 2254(d).

> This Court has long held that the remedy for allegations of *juror partiality* is a hearing in which the defendant has the opportunity to prove actual bias. (emphasis added)

The opinion cited *Remmer* with approval, including the characterization of a bribe attempt as "presumptively prejudicial". *Id.*, 455 US at 213, 102 S Ct at 945. The Court ruled that bias would not be implied as a matter of law, relying on cases which rejected conclusive presumptions of bias.[22]

> . . . [D]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation. . . . *Due process means a jury capable and willing to decide the case solely on the evidence before it*, and a trial judge ever watchful to prevent prejudicial occur-

---

[22] *Dennis* v *United States*, 339 US 162, 70 S Ct 519, 94 L Ed 734 (1950) (claim that defendant in criminal contempt of Congress was denied fair trial because members of jury were government employees subject to a loyalty oath; claim of implied bias from fear of dismissal of employment if jury acquitted); *Chandler* v *Florida*, 449 US 560, 101 S Ct 802, 66 L Ed 2d 740 (1981) (allegation that televising trial influenced jury and denied fair trial).

> rences and to determine the effect of such occurrences when they happen. (emphasis added)

Phillips was followed in *Rushen* v *Spain*, 464 US 114, 104 S Ct 453, 78 L Ed 2d 267 (1983). A juror realized during trial that she knew the victim of a murder committed by a witness and told the judge that she was not affected by that testimony. The state court held an evidentiary hearing and determined that the error was harmless beyond a reasonable doubt. This Court rejected a *per se* rule requiring reversal whenever a juror and judge have unrecorded *ex parte* communications during trial and applied traditional harmless error analysis, with deference to the state court finding under 28 USC § 2254(d).[23]

In a footnote to the *per curiam* opinion, *Rushen* summarized the holding in *Phillips*.

> We concluded that, in the circumstances of that case, it would not be proper to impute bias in the verdict or to find a post-trial hearing inadequate as a remedy for the alleged due process violation. . . . The facts here *involve no inference of juror misconduct or third party influence*, and therefore *are of far less concern* than the conduct at issue in *Smith*. (emphasis added)[24]

Phillips and *Rushen* do not represent a retreat from the rebuttable presumption of prejudice resulting from juror exposure to extrinsic, material information. Rather, they maintain a consistent refusal to conclusively presume bias or partiality of a juror except in very limited circumstances.[25]

---

[23] The juror and judge "did not discuss any fact in controversy". 104 S Ct at 457.

[24] *Id.*, 104 S Ct at 456 n 3.

[25] *Dennis* v *United States*, 339 US 162, 70 S Ct 519, 94 L Ed 734 (1950); *Chandler* v *Florida*, 449 US 560, 101 S Ct 802, 66 L Ed 2d 740 (1981);

The Sixth Circuit erroneously held that *Phillips* overruled the rebuttable presumption of prejudice from juror exposure to extraneous information by confusing two sets of related but distinct legal doctrines. The court failed to recognize that juror partiality implicates different constitutional rights and concerns than juror consideration of extrinsic evidence. Further, the distinction between a conclusive presumption of bias and a rebuttable presumption of prejudice was overlooked.

Phillips explicitly stated that it dealt with jury partiality.[26] *Rushen* dealt with a claim of partiality and denial of counsel, but the Court noted that the *ex parte* conversations did not relate to the facts or law of the case.[27] Neither case involved consideration of material evidence not admitted at trial.[28] Although sharing a basis in the Sixth Amendment, issues of partiality or bias and issues of denial of counsel, confrontation and cross-examination raise different concerns about the trial.

When an issue of the jury's impartiality under the Sixth Amendment is raised, the question is whether the jury is "*capable and willing* to decide the case solely on the evidence before it".[29] The reality that jurors are human is addressed by *voir dire*, protective instructions, and the

---

[26] "This Court has long held that the remedy for allegations of *juror partiality* is a hearing in which the defendant has the opportunity to prove actual bias". *Smith* v *Phillips*, 455 US 209, 215, 102 S Ct 940, 945, 71 L Ed 2d 78 (1982) (emphasis added)

[27] *Rushen* v *Spain*, 464 US 114, 104 S Ct 453, 457, 78 L Ed 2d 267 (1983)

[28] *Mattox* v *United States*, 146 US 140, 13 S Ct 50, 36 L Ed 917 (1892); *Turner* v *Louisiana*, 379 US 466, 472–473, 85 S Ct 546, 549–550, 13 L Ed 2d 424 (1965); *Remmer* v *United States*, 347 US 227, 74 S Ct 450, 98 L Ed 654 (1954).

[29] *Smith* v *Phillips*, 455 US 209, 217, 102 S Ct 940, 946, 71 L Ed 2d 78 (1982); *United States* v *Gagnon*, 470 US 522, 105 S Ct 1482, 84 L Ed 2d 486 (1985).

supervision of the trial judge. A defendant asserting that a juror has a specific bias or knowledge which impairs the ability to impartially consider the case must prove that claim, and is given ample opportunity through *voir dire* and evidentiary hearings.[30]

As the knowledge and attitudes become more specific to the case, other constitutional concerns arise. A defendant is also entitled to have any evidence considered by the jury subject to the trial safeguards of counsel, confrontation and cross-examination.[31] When a defendant shows that the jury has considered extraneous information not admitted at trial, the concerns over the jury's deliberation expand to include the reliability of the information and its effect upon the fact-finding process.

More importantly, a defendant who has met the burden of showing that extrinsic evidence infected jury deliberations has also shown that the jury was *not* capable or willing to decide the case solely on the evidence. In disregard for the court's instruction, the jury considered information not admitted at trial. The Sixth Amendment is violated by such conduct, independently of the jury's general good faith and impartiality.

This crucial distinction is overlooked by the Sixth Circuit. In *Haley* v *Blue Ridge Transfer Co*, 802 F2d 1532, 1535-1538 (4th Cir 1986), the court affirmed the continuing validity of the *Remmer* presumption in extrinsic evidence

---

[30] This Court has been unimpressed oy claims that jurors cannot set aside generalized attitudes and influences. *Dennis* v *United States*, 339 US 162, 70 S Ct 519, 94 L Ed 734 (1950); *Frazier* v *United States*, 335 US 497, 69 S Ct 201, 93 L Ed 187 (1945); *Wood* v *United States*, 299 US 123, 57 S Ct 177, 81 L Ed 78 (1936); *Chandler* v *Florida*, 449 US 560, 101 S Ct 802, 66 L Ed 2d 740 (1981).

[31] *Turner* v *Louisiana*, 379 US 466, 472-473, 85 S Ct 546, 549-550, 13 L Ed 2d 424 (1965); *Irvin* v *Dowd*, 366 US 717, 722, 81 S Ct 1639, 1642, 6 L Ed 2d 751 (1966).

cases. *Phillips* was distinguished because it dealt with "intrinsic juror bias subject to revelation during voir dire".

> We see a basic difference between the beliefs, feelings, preferences, and general personality traits that every juror carries into the courtroom and the power of after-acquired extraneous information (be it in the form of threats, bribe offers, lies or as in the present case simple opinions) to infect and extirpate impartiality from the fact-finding process.[32]

Until a defendant establishes actual bias or partiality on the part of a juror, there has been no showing of a constitutional violation. The refusal to imply bias as a matter of law "every time a juror has been placed in a potentially compromising situation" merely reflects the presumption that well-meaning citizens will do their sworn duty.[33]That presumption cannot be indulged after a showing that the

---

[32] In *Bayramoglu* v *Estelle*, 806 F2d 880, 887-888 (9th Cir 1986), the court applied the presumptive prejudice standard to an instance of juror misconduct involving efforts at legal research by a juror. In contrast, the issue of juror bias was examined under *Phillips*. Another line of cases limits *Phillips* to habeas review. In *United States* v *Malloy*, 758 F2d 979, 981-982 (4th Cir 1985), the court held that the burden was on the petitioner in a habeas corpus proceeding to show actual prejudice resulting from juror partiality not disclosed on *voir dire*, emphasizing that the allocation of the burden depended on the collateral nature of the attack on the conviction. See *Rogers* v *McMullen*, 673 F2d 1185, 1189-1190 (11th Cir 1982) *cert den'd* 459 US 1110, 103 S Ct 740, 74 L Ed 2d 961 (1983) (*Phillips* interpreted as requiring evidentiary hearing in habeas corpus proceedings asserting challenge to competence or partiality of juror).

[33] *Smith* v *Phillips*, 455 US 209, 217, 102 S Ct 940, 946, 71 L Ed 2d 78 (1982); *McDonough Power Equipment Co* v *Greenwood*, 464 US 548, 104 S Ct 845, 78 L Ed 2d 663 (1984). A strong affirmation of that trust underlies the recent decision in *McCleskey* v *Kemp*, - US - , 107 S Ct 1756, - L Ed 2d - (1987) (absent evidence specific to case, Court will not assume that discretion of jury was exercised in invidious manner)

jury improperly considered extrinsic evidence and violated the defendant's Sixth Amendment rights. When the integrity of the jury's deliberations has been compromised by extraneous information, the risk of an unfair verdict due to the lack of Sixth Amendment protections requires the *Remmer* presumption of prejudice, subject to a showing of harmless error by the Government.

The Sixth Circuit further confused the doctrines of implied bias and rebuttable presumption. A holding that bias should be implied means that prejudice is conclusively presumed and the error cannot be considered harmless. *Dennis* v *United States*, 339 US 162, 70 S Ct 519, 94 L Ed 734 (1950); *Leonard v United States*, 378 US 544, 84 S Ct 1696, 12 L Ed 2d 1028 (1964). *Remmer* also refused to conclusively presume prejudice as the result of improper contact with a juror, although it held such an extraneous influence was "for obvious reasons, deemed presumptively prejudicial".[34]

A rebuttable presumption of prejudice shifts the burden of going forward at the evidentiary hearing to the Government. Having shown a violation of Sixth Amendment rights by the jury's consideration of extrinsic evidence, a defendant is entitled to a new trial unless the error was

---

[34] *Remmer*, *supra*, 347 US at 229, 74 S Ct at 451. In *Smith* v *Phillips*, 455 US 209, 102 S Ct 940, 949, 71 L Ed 2d 78 (1982), Justice O'Connor's concurring opinion referred to the "conclusive presumption of implied bias". Similarly, *Rushen* v *Spain*, 464 US 114 104 S Ct 453, 78 L Ed 2d 267 (1983) refused to accept a *per se* rule that any *ex parte* communications between a juror and a judge required a new trial. The consequences of a rule which conclusively presumes the existence of bias have led courts to reject claims of implied bias except in extreme cases. *United States* v *Hill*, 688 F2d 18, 20 (6th Cir 1982) *cert den'd* 103 S Ct 498 (rejecting *per se* rule for consideration of extrinsic materials); *Government of Virgin Islands* v *Gereau*, 523 F2d 140, 153-154 (3d Cir 1975) (same as to third party communications); *United States* v *Phillips*, 664 F2d 971, 999 (5th Cir 1981).

harmless.[35] The burden on the Government to show that the extrinsic evidence considered by the jury did not prejudice the defendant is a familiar aspect of harmless error analysis and is a necessary aspect of the remedy for Sixth Amendment violations.[36] *Mattox* and *Remmer* reflect the danger to a fair trial from juror consideration of extrinsic evidence and the gravity of the Sixth Amendment violations.[37] The need to remedy the constitutional violations while respecting the privacy of jury deliberations compels the rebuttable presumption.

In *Mattox*, the Court ruled that a juror could testify about "the existence of any extraneous influence, although not as to how far that influence operated upon his mind". *supra*, 146 US at 149.[38] The proscription against inquiry into jurors' mental processes and deliberations is continued by FRE 606(b) and "represents a persuasive reason for creating the presumption of prejudice in the first place".[39]

---

[35] The court may consider any relevant factors, except those precluded by FRE 606(b), including the content of the materials, the manner in which the jury was exposed to it, the strength of the other evidence, and the length of deliberations. *United States* v *McKinney*, 429 F2d 1019, 1031-1033 (5th Cir 1970); *United States* v *Hillard*, 701 F2d 1052, 1064 (2d Cir) *cert den'd*, 103 S Ct 2431 (1983); *United States* v *Weiss*, 752 F2d 777, 783 (2d Cir 1985).

[36] In *Kimmelman* v *Morrison*, - US - , 106 S Ct 2574, 91 L Ed 2d 305 (1986), this Court said that upon direct review under the harmless-error standard of *Chapman* v *California*, 386 US 18, 87 S Ct 824, 17 L Ed 2d 705 (1967), the prosecution is required to prove that the defendant was not prejudiced by the error.

[37] In *Hobson* v *Wilson*, 737 F2d 1, 48 (DC Cir 1984) *cert den'd* 105 S Ct 1843 (1985), the court stated that the *Mattox* presumption was based on "the most fundamental premise of our jury system", *i.e.* that "the jury works in a controlled environment, untouched by any influence other than that properly permitted by the trial judge."

[38] The holding of *Mattox* was recently reaffirmed in *United States* v *Tanner*, - US - , - S Ct - , - L Ed 2d - (June 22, 1987).

[39] *Haley* v *Blue Ridge Transfer Co*, 802 F2d 1532, 1535 n 10 (4th

A defendant asserting violation of Sixth Amendment rights can only present evidence that the jury did in fact consider matters not properly in evidence. The jurors may not be asked whether they considered that information in reaching their verdict.[40] Absent the *Remmer* presumption, a defendant would rarely be able to establish actual prejudice from juror exposure to extraneous information. The jurors' sincere testimony that their verdict was fair, together with the presumption that jurors properly fulfill their duties, would pose an insurmountable obstacle; prejudicial violations of the Sixth Amendment could be blithely ignored.

Such a result runs contrary to this Court's traditional vigilance against the intrusion of extraneous information into jury deliberations. The "obvious reason" for the presumption is the defendant's right to have the jury decide guilt free from outside influences. The burden to show the harmlessness of extrinsic evidence prior to conviction "rightfully rests upon the government in light of the fact that it . . . must prove its case and overcome defendant's presumption of innocence".[41] The presumption protects against the "dagger of hidden evidence" by recognizing the real risk of prejudice.[42]

Cir 1986). Other courts have recognized that the presumption of prejudie is an accommodation of the rule "forbidding inquiry into the subject most truly pertinent". *Miller* v *United States*, 403 F2d 77, 83 n 11 (2d Cir 1968) (Friendly, J.); *United States* v *Bassler*, 651 F2d 600, 603 (8th Cir 1981); *Owen* v *Duckworth*, 727 F2d 643, 646 (7th Cir 1984).

[40] *Mattox* v *United States*, 146 US 140, 13 S Ct 50, 36 L Ed 917 (1892); *Rushen* v *Spain*, 464 US 114, 104 S Ct 453, 457 n 5, 78 L Ed 2d 267 (1983).

[41] *Miller* v *Estelle*, 677 F2d 1080, 1085 (5th Cir 1982). The court refused to apply the *Remmer* presumption to the sentencing phase of a trial, requiring a showing of actual prejudice.

[42] *United States* v *Howard*, 506 F2d 865, 867 (5th Cir 1975)

The presumption of prejudice is a necessary part of the harmless error analysis for violations of the right to counsel, confrontation and cross-examination. The repudiation of *Remmer* by the Sixth Circuit is a significant devaluation of the Sixth Amendment right to be tried solely on evidence admitted at trial. By requiring a defendant to establish actual prejudice, bereft of the *Remmer* presumption and constrained by FRE 606(b), the Sixth Circuit makes the post-trial hearing an insurmountable obstacle. When the findings regarding prejudice are reviewed under an abuse of discretion standard, a defendant who has established that the jury considered material, extrinsic evidence is left without any meaningful remedy.

The Sixth Circuit has wrongly interpreted *Phillips*. The rebuttable presumption of prejudice from juror consideration of material, extrinsic evidence recognized in *Mattox* and *Remmer* and the other circuits remains an integral part of the harmless error review of the Sixth Amendment violations.

II. THE JURY'S EXPERIMENT ON THE CEILING TILE TO TEST ITS COMBUSTIBILITY RELATED TO MATERIAL ISSUES AND REQUIRED AN EVIDENTIARY HEARING. A NEW TRIAL IS REQUIRED TO REMEDY THE DENIAL OF THAT HEARING AND THE PREJUDICE PRESUMED FROM THE VIOLATIONS OF PETITIONER'S RIGHTS TO COUNSEL, CONFRONTATION AND CROSS-EXAMINATION.

A. The trial court erroneously held that the jury's attempt to burn the ceiling tile did not constitute extrinsic evidence considered in violation of Petitioner's Sixth Amendment rights.

The jury's experiment on the ceiling tile during deliberations resulted in consideration of extrinsic evidence. Petitioner was entitled to an evidentiary hearing at which

the jury was rebuttably presumed to have been prejudiced by that extraneous information relating to a material issue.

The trial court ruled that "this is not extraneous evidence which was presented to the jury". [Appendix, p 7a] This holding is contrary to precedent establishing that jury experiments during deliberations violate Sixth Amendment guarantees of confrontation, cross-examination and assistance of counsel.

In *United States* v *Beach*, 296 F2d 153 (4th Cir 1961), the jury tested the noise of adding machines during deliberations, apparently to determine whether the defendant could hear them when used in a gambling establishment. The court distinguished "experiments which have the effect of putting [jurors] in possession of evidence not offered at the trial" from "the mere making of a more critical examination of an exhibit".[43] A conviction was reversed in *Wilson* v *United States*, 116 F 484 (9th Cir 1902) because the jury was instructed to determine whether opium was "prepared for smoking" and did so during deliberations.

> It is contrary to fundamental principles to permit jurors to receive evidence without the presence of the defendant to the prosecution. . . . Yet the jury was left to determine that essential fact for themselves, by experiment, and in the absence of the defendants, who were thus wholly deprived

---

[43] Courts have permitted jurors to examine the exhibits and judge the likelihood of argued scenarios. *United States* v *Hephner*, 410 F2d 930, 936 (7th Cir 1969) (wearing sunglasses; identification issue); *United States* v *Hawkins*, 595 F2d 751, 753 (DC Cir 1978) *cert den'd* 99 S Ct 2005 (1979) (looking through binoculars; ability of police to observe details); *United States* v *Avery*, 717 F2d 1020, 1026 (6th Cir 1983) (crawling and dragging involved in alleged crime); *Simon* v *Kuhlman*, 549 F Supp 1202, 1205–1208 (SD NY 1982) (stocking over face; identification)

> of the opportunity to contest the correctness of the jury's experiments. . .

Experiments by the jury are particularly threatening because "[i]t is impossible to determine without the benefit of a vigorous cross-examination following formal introduction of evidence whether an experiment duplicated what actually occurred in the case. Highly misleading results can follow".[44]

The jury's attempt to burn the ceiling tile was more than the "use [of] common experiences and illustrations" and constituted an "experiment in the jury room [which] could create substantially prejudicial influences on the jury's deliberations".[45] The expert testimony and the parties' theories involved a factual dispute about the ceiling tile's combustibility. In the exchange with McClary, defense counsel stated the purpose was to "demonstrate to the jury . . . how flammable that tile is. It will burn, almost like paper".[46] The arson investigator conceded that edges and small pieces of the tile might burn, but sustained heat was needed to ignite the tile's surface. Factors affecting the tile's combustibility and the fire's spread through falldown were extensively developed in the testimony.

The scorch mark indicates that the jury attempted to recreate the experiment proposed by defense counsel during his cross-examination of a key Government witness. The decision by counsel not to pursue the experiment left undeveloped the conditions necessary for a proper experiment. Without the protections of cross-examination and

---

[44] *In re Beverly Hills Litigation*, 695 F2d 207, 214 (6th Cir 1982) *cert den'd* 461 US 929 (1983). *Durr* v *Cook*, 589 F2d 891 (5th Cir 1979) (habeas proceeding; juror went to car dealership to test plausibility of victim's movement in self defense case); *United States* v *Castello*, 526 F Supp 847 (WD Tex 1981) (ballistics experiment).

[45] *United States* v *Avery*, 717 F2d 1020, 1026 (6th Cir 1983)

[46] Appendix, p 13a

counsel, the jury conducted an experiment "to test the truth of testimony" about a material issue.[47] Without an evidentiary hearing, the record does not disclose the details of the attempted burning, *e.g.* the type of flame used, the distance from the flame to the tile, and the length of time that the flame was applied.

Petitioner contends that the attempted burning of the ceiling tile was extraneous evidence and that an evidentiary hearing was required to determine whether his Sixth Amendment rights were prejudiced by the experiment.

B. A new trial is required due to the denial of an evidentiary hearing and the rebuttable presumption that the jury's experiment prejudiced Petitioner's Sixth Amendment rights.

The trial court's statement that "the scorching of the tile does not bear on the central issue to this case" is irreconcilable with the finding "that there was a difference as to whether there could be a fire started in the center of the tile or the edges, . . . and as to whether the falling tile had started new fires at a substantial distance from each other".[49] The Sixth Circuit also misapprehended the record, basing its conclusion that the jury's experiment was harmless on the belief that "Senawi's own witness explained that the experiment would not simulate that actual circumstances of the fire and would thus prove nothing".[50] The petition for rehearing showed that Petitioner's expert witness gave no such testimony and, in fact, stated that the ceiling tiles burned and spread the fire.[51]

---

[47] *United States* v *Beach*, 296 F2d 153, 158 (4th Cir 1961). The court listed examples of improper experiments: testing firearms, tracing signatures, recreating tracks with shoes, and determining whether voices could be heard outdoors.

[49] Appendix p 7a

[50] Appendix, p 2a

[51] Nolan, Vol 10, p 19, 45-47, 53-56, 65-68, Vol 11, p 41-59.

Petitioner submits that neither court appreciated the significance of the ceiling's involvement and the importance of the tile's combustibility to his defense. After conceding that there was evidence of opportunity and motive, the only issue remaining for the jury was the cause of the fire, *i.e.*, whether the fire was intentionally set.[52] The key to the Government's case was the claim that the existence of four separate fire areas in the storeroom indicated that the fires were intentionally set because no natural or accidental cause explained the fire's spread.[53]

Evidence relating to the burning of the ceiling was presented to rebut the Government's theory by showing a natural explanation for the communication of the fire to separate areas. On cross-examination, the Government witnesses admitted that the fires had burned up the wall to the ceiling, that the ceiling was burned out over the entire fire area, and that the fires were connected at ceiling level.[54] Petitioner's arson expert testified that the fire burned up the wall to the ceiling and spread to other areas through fall-down.[55]

The tile's combustibility was important in evaluating conflicting factual and expert testimony about the fire's cause and spread. The Government's experts testified that the fire did not burn long enough to ignite the ceiling and that tiles had been knocked down by the firefighters' hoses.[56] The defense expert testified that the tiles and

---

[52] Defendant's Closing Argument, Vol 12, p 95-96.

[53] Lewis, Vol 1, p 85-86; Silvani, Vol 1, p 146; Parker, Vol 2, p 201; Tackett, Vol 3, p 150, Vol 4, p 46; McClary, Vol 7, p 24, 32, Vol 8, p 8-12, 35.

[54] Lewis, Vol 2, p 6-7, 43-44; Tackett, Vol 4, p 153-154; Phelps, Vol 6, p 52-55.

[55] Nolan, Vol 10, p 19, 45-47, 53-56, 65-68, Vol 11, p 41-59.

[56] Tackett, Vol 3, p 174; Grignon, Vol 2, p 139; Tackett, Vol 4, p 131-132, 159.

supporting wooden grids were burned away and that fall-down of the ceiling tile was responsible for spreading the fire to separate areas.[57]

The jury's experiment was apparently intended to determine how readily the ceiling tile could be ignited. The curiosity of the jury and their willingness to perform the experiment manifest the potential prejudice to Petitioner. Watching an unsuccessful attempt to burn the tile had to have affected the jurors' resolution of conflicting expert testimony about the ceiling's capacity to spread the fire under the conditions existing at Petitioner's store. Like many arson cases, this was a "battle of the experts" about an essential element of the offense, *i.e.*, incendiary origin.

Petitioner was entitled to have the court presume that the jury's experiment prejudiced his Sixth Amendment rights and to require the Government to prove that the error was harmless beyond a reasonable doubt. The results of the jury's experiment were evidence developed without the protections of counsel and cross-examination and related to material issues of fact and opinion.

The prejudice resulting from the jury's experiment requires a new trial since a remand for an evidentiary hearing at this late date would be an inadequate remedy. In *United States* v *Thomas*, 463 F2d 1061 (7th Cir 1972), a mail fraud conviction was reversed when the jurors were exposed to a prejudicial newspaper article during deliberations. The trial judge refused to hold an evidentiary hearing. The court held that a remand would be fruitless because of the lapse of time and the prejudicial nature of the extraneous evidence. A similar remedy was ordered in *United States* v *Rhodes*, 556 F2d 599 (1st Cir 1977) and *United States* v *Attell*, 655 F2d 703 (5th Cir 1981).

A remand for an evidentiary hearing would not be an effective procedure. Recalling the jurors to testify about

---

[57] Nolan, Vol 10, p 45-47, 53-56; Vol 11, p 54-59.

the attempted burning of the ceiling tile after the lapse of time involved in this appeal, limited by FRE 606(b), would be unlikely to yield probative testimony about the existence of prejudice. Since a remand is not an adequate remedy in this case,[58] a new trial should be ordered because of the prejudicial violation of Petitioner's right to be tried solely on the evidence admitted at trial.

III. THE MATERIAL EVIDENCE DISCOVERED AFTER TRIAL CONCERNING THE ORIGIN AND SPREAD OF THE FIRE, THE INTENTIONAL MISHANDLING OF A CRUCIAL EXHIBIT, THE BIASED INVESTIGATION, AND THE FAILURE TO DISCLOSE EXCULPATORY WITNESS STATEMENTS REQUIRES A NEW TRIAL.

Petitioner contends that a new trial should have been granted because of the newly discovered testimony of three firemen concerning the origin and spread of the fire, the intentional mishandling of crucial evidence, the discriminatory failure to conduct an objective investigation, and the failure to disclose exculpatory evidence.[59]

A. The Government failed to disclose exculpatory information regarding the observations made by the first firefighters to enter the building.

The statements taken from Ellis Agee and Russell VanHorn contained exculpatory evidence which was not disclosed by the Government. The key aspect—that they found a single fire upon entering the market—directly contradicts the Government's theory—that there were four separate fires intentionally set by Petitioner.

---

[58] *Rushen* v *Spain*, 464 US 114, 104 S Ct 453, 456, 78 L Ed 2d 267 (1983).

[59] Transcripts of the three firefighters' sworn statements on May 8, 1986, were exhibits to Petitioner's Second Motion for New Trial Based on Newly Discovered Evidence. [R.70]

VanHorn and Agee were the first firemen to enter the building and observed a single, small fire above a pallet in the storeroom. They decided to let the fire continue burning to provide illumination in the dark, smoky market. They left the market when their oxygen tanks ran low, and reentered the building to find that the fire had spread up to the ceiling and across the partition wall in the storeroom. In their opinion, the fire appeared to start from electrical causes near the one pallet that was burning when they entered the market.[60]

The trial court erroneously stated that VanHorn and Agee's testimony "would not have resulted in a different outcome".[61] If the jury had known that the first firefighters found only a single fire which spread into separate areas afterwards, the Government's expert testimony about four intentionally set fires would have been rejected.

At the hearing on Petitioner's motion, there was a dispute concerning the disclosure of a handwritten statement by VanHorn. Petitioner's trial counsel stated, in an affidavit and on the record, that he never received a copy. The United States Attorney said that he had hand-delivered a copy of the statement to Petitioner's counsel but could not document it. The trial court found that there was no withholding of the statement without any sworn testimony. The court disregarded, without any stated reasons, the affidavit and statement by Petitioner's counsel that the VanHorn statement had not been furnished.[62]

The court overlooked the nondisclosure of oral statements taken from VanHorn and Agee by a federal agent and related to the United States Attorney. The trial court found that the witnesses were known to Petitioner's

---

[60] Van Horn Tr p 5-10, 13-16; Agee Tr p 4, 6-9, 12-16, 20

[61] Appendix, p 8a

[62] R. 70: Affidavit, parag. 8-11; Tr 5/23/86, p 7-8, 21, 27.

counsel from a prior civil deposition.[63] However, that misses the point—the Government had taken statements from Agee and VanHorn which were requested and which were plainly exculpatory. The Government's belief that "Agee and Van Horn were talking about two fires different from each other"[64] hardly justifies the failure to disclose statements flatly contradicting the Government's theory of incendiary origin.

An evidentiary hearing was required to resolve the dispute concerning the nondisclosure of VanHorn's written statement and VanHorn and Agee's oral statements. Their observations during the early stages of firefighting were consistent with Petitioner's position and would have resulted in a different outcome at trial. *United States* v Bagley, - US -, 105 S Ct 3375, 3384, 87 L Ed 2d 481 (1985); *United States* v *Ismail*, 756 F2d 1253 (6th Cir 1985).

B. The newly discovered testimony of Robert Anderson raises material questions about the alleged use of an accelerant in the fire and the opinion testimony of a fire marshal.

At trial, Fire Chief Parker testified that he found a bottle of fluid on the floor by the meat counter, picked it up and secured it in his office at the fire department overnight. He said that the bottle was returned to its original location the next morning.[65] In his sworn statement, Robert Anderson, an Ecorse firefighter, recalled finding a container of charcoal lighter fluid on the rear seat floor of Chief Parker's car. The fluid was leaking on

---

[63] Petitioner's counsel initially stated that he was unaware of the existence of Agee and VanHorn. When presented with a deposition transcript mentioning their names, he stated that he had completely forgotten that reference.

[64] Tr 5/23/86, p 27

[65] Parker, Vol 2, p 190-191

the floor, so he threw it in the garbage. Later, Parker questioned Anderson about the fluid and told him to retrieve it from the garbage.[66]

This statement contradicts Chief Parker's testimony and raises serious questions as to the admissibility and weight of key evidence. Parker claimed to have found a half-full container in the market which was taken into his custody and secured at his office. Anderson found a nearly full container on the rear floor of Parker's car.[67]

Parker's failure to disclose the complete circumstances of his handling of a key exhibit was prejudicial to Petitioner, since the amount of fluid contained in the bottle was a material, disputed issue.[68] The Government's theory that charcoal lighter fluid was used as an accelerant depended upon proof that some of the fluid was gone from the bottle when found by Parker. Anderson's statement that the bottle was nearly full despite spilling onto the floor mat and being thrown into the trash would have substantially refuted the Government's claim.

Anderson's statement also raises troubling questions about the objectivity and integrity of the arson investigators from River Rouge. Fire Marshal Tackett testified to his opinion that the fire was deliberately set and was extensively cross-examined about deficiencies in his investigation.[69] To bolster Tackett's credibility, the Government argued that he "has absolutely no personal or professional stake in what caused this fire".[70]

---

[66] Anderson, Tr p 4-12

[67] Parker, Vol 2, p 193; Vol 3, p 44-45; Anderson, Tr p 9

[68] Paker, Vol 2, p 193, Vol 3, p 44-45; Switalski, Vol 5, p 99; Wineman, Vol 12, p 50-52.

[69] Tackett, Vol 4, p 46-49, 73-74, 79, 81-84, 110-112, 129, 148

[70] Government Closing Argument, Vol 12, p 84-86.

Tackett claimed to approach the fire scene presuming the fire to be accidental.[71] The statement about the need to stop Arabs from burning their stores, made prior to any investigation, directly contradicts Tackett's profession of objectivity. The credibility of the expert witnesses was crucial as the parties presented conflicting expert opinions on the fire's cause and origin. An investigator's statement that Arabs and Chaldeans are known for starting fires and that his department was putting a stop to it, made before even setting foot in the market, is an appalling declaration of discriminatory attitudes which undermines his entire testimony. Anderson had the impression that the investigators believed that Petitioner was guilty before they went to the market. A jury advised of Tackett's bigoted presumption of Petitioner's guilt would have likely disregarded his opinion.

---

[71] Tackett, Vol 4, p 83

CONCLUSION

Petitioner Sabah Senawi requests this Court to grant a writ of certiorari to the Sixth Circuit Court of Appeals, to reverse the orders affirming his conviction and the denial of a new trial, and to remand this case to the United States District Court for the Eastern District of Michigan for a new trial.

Respectfully submitted,
RICHARD C. KRAUS
FARHAT, STORY & KRAUS, P.C.
1111 Michigan Avenue
East Lansing, MI 48823
517-351-3700
Counsel Of Record

LEO A. FARHAT
RICHARD C. KRAUS
FARHAT, STORY & KRAUS, P.C.
Attorneys For Petitioner

July 2, 1987

APPENDIX

APPENDIX

Opinion of the Sixth Circuit Court of Appeals April 6, 1987

NO. 86-1578

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

SABAH SENAWI,
Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

Before: MARTIN, WELLFORD, and NELSON, Circuit Judges.

PER CURIAM. Sabah Senawi was found guilty by a jury of arson. He appeals and argues it was error to have denied his motion for an evidentiary hearing to determine whether extrinsic evidence was introduced into the jury's deliberations. The district court had refused the request because it thought that no extrinsic evidence had been introduced and that, even if it had, it was not prejudicial to Senawi. We affirm.

At trial Senawi's counsel introduced into evidence a ceiling tile from the burned building and asked a witness how quickly the tiles would burn. He then sought to demonstrate to the jury that the tile would burn, but the witness

maintained that the experiment would not prove anything because the conditions of the experiment would not simulate those of the actual fire. Senawi's counsel then decided not to perform the demonstration. Apparently during its deliberations, however, the jury tried the experiment.

Shortly after the verdict, Senawi filed a motion for an evidentiary hearing, alleging that the jury had improperly conducted an experiment during deliberations by attempting to burn the ceiling tile. He claimed that the jury's experiment had deprived him of his right to confrontation and his right of cross- examination with respect to the evidence resulting from the experiment.

In *United States v. Griffith*, 756 F.2d 1244, 1251-52 (6th Cir. 1985), we described the legal rules that govern a situation such as this where the jury might have been exposed to extraneous evidence. The court should first determine whether the extrinsic evidence resulted in "actual prejudice" to the defendant. "After the judge makes the required investigation, the decision whether to grant a new trial should be reviewed only for abuse of discretion." *Id.* at 1252 (citations omitted).

In this case, we think that the district court may have erred but that the error, if any, does not warrant a reversal. The appropriate procedure would have been to conduct a hearing based upon the filing of an affidavit by counsel to determine if extrinsic evidence was introduced, but defense counsel here failed to advise the district court sufficiently of any prejudice, and failed to show that the jury, in fact, conducted an experiment which he himself may have encouraged during his cross examination of Mr. McClary. Moreover, our independent review of the record indicates that even if the jury did conduct the experiment and this may have involved introduction of extraneous evidence, that evidence was harmless; Senawi's own witness explained that the experiment would not simulate the actual circumstances of the fire and would thus prove noth-

ing. In any event, we cannot say that the district court abused it discretion in denying a mistrial for lack of prejudice to Senawi. We find no other error in respect of the trial of Senawi.

The judgment of the district court is affirmed.

Order Denying Rehearing and Rehearing En Banc of the Sixth Circuit Court of Appeals
May 20, 1987

No. 86-1578

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

SABAH SENAWI,
Defendant-Appellant

ORDER

Before: MARTIN, WELLFORD, and NELSON, Circuit Judges.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of his Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

Order Denying Motion for Inquiry Into Jury Conduct of the United States District Court for the Eastern District of Michigan
April 9, 1986

CRIMINAL NO. 85CR80630DT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION
UNITED STATES OF AMERICA,

Plaintiff,

-vs-

SABAH SENAWI,

Defendant.

ORDER DENYING MOTION FOR INQUIRY INTO JURY CONDUCT

At a session of said court,
held in the U.S. Courthouse. in the City of Detroit,
State of Michigan, on
April 9, 1986

PRESENT: HONORABLE ANNA DIGGS TAYLOR
United States District Court Judge

This matter having come before the court on motion of the defendant, and the court having received and read the pleadings of the parties and a hearing having been held; NOW THEREFORE;

IT IS SO ORDERED, that under Rule 606, Federal Rules of Evidence, no inquiry should be held because there was not extraneous information introduced into the jury's deliberations and the conduct complained of was not prejudicial because it did not concern an issue which was in dispute; accordingly, the motion is DENIED.

ANNA DIGGS TAYLOR
United States District Court Judge
DATED: APR 9 1986

Oral Opinion Denying Motion for Inquiry Into Jury Conduct of the United States District Court for the Eastern District of Michigan
March 19, 1986

The Court is going to deny the motion. It does appear to the Court that this is not extraneous evidence which was presented to the jury.

The pieces of tile were presented to the jury as exhibits for them to keep in their jury room, and it's true there is a scorch mark on this piece of tile, but I do not find that this is an extraneous matter and improperly presented to the jury, and intruding upon its deliberations.

Also, the scorching of the tile does not bear on the central issue to this case.

It's true that there was a difference as to whether there could be a fire started in the center of the tile or the edges, as I recall, and as to whether the falling tile had started new fires at a substantial distance from each other, but the issue of arson itself and the mail fraud itself is not touched upon by the fact that the flammability of the tile -- or the inflammability of it, so the Court must deny the motion. [Tr 3/19/86, p 17-18]

Oral Opinion Denying Second Motion for New Trial Based on Newly Discovered Evidence by the United States District Court for the Eastern District of Michigan

May 23, 1986

The Court must deny the motion of the defense in this matter.

It appears, first of all, that if the information the defense claims was lacking in the case is the information stated in these three portions of depositions which have been presented to the Court, that information would not have resulted in a different outcome. There is no reasonable probability that this information would have resulted in a different outcome of the prosecution.

The information given here continues to support the government's case that this was not an electrical fire and that it was started, possibly by accelerants, in this storeroom around the pallets which the witness identifies.

The information, moreover, was not withheld by the government. First of all, Anderson was no more known to the government than to the defense. He apparently has been discovered by Mr. Bacalis, and his testimony neither adds or detracts anything from the testimony of the witness at trial.

The other two, it appears to the Court, were known to the defense from the civil case which proceeded concurrent with this criminal prosecution.

The Court has positive evidence that the defense knew of these two witnesses at that time, early in discovery in the civil case in 1985.

Moreover, the Court does find it highly probable that the defense sent these names on a document which the government has given to the Court in its letter sending discovery materials to Mr. Bacalis in the course of this prosecution.

Mr. Bacalis has not complained of a lack of any of the other information which was forwarded simultaneous with the information which identifies these potential witnesses.

They were not called as witnesses by the government, so there was no reason for the government to provide statements which they might have or might not have given to Mr. Bacalis.

I find no misconduct, I find no information was withheld, and I find that the information, if it had been presented at trial, would not, in any probability, have resulted in any different outcome of the prosecution. So the motion must be denied. [Tr p 35-37]

Cases in Conflict with the Decisions of the Sixth Circuit

First Circuit:

United States v Flaherty, 668 F2d 566, 602 (1st Cir 1981); *Lacy v Gabriel*, 732 F2d 7 (1st Cir 1984).

Second Circuit:

United States v Hillard, 701 F2d 1052, 1064 (2d Cir) *cert den'd* 461 US 958, 103 S Ct 2431, 77 L Ed 2d 1318 (1983); *United States v Weiss*, 752 F2d 777, 782-783 (2d Cir 1985); *Sher v Stoughton*, 666 F2d 791, 793-795 (2d Cir 1981).

Third Circuit:

United States v Kum Seng Seo, 300 F2d 623 (3rd Cir 1962); *United States v Coleman*, 805 F2d 474 (3rd Cir 1986); *United States v Leon*, 739 F2d 885 (3rd Cir 1984).

Fourth Circuit:

Haley v Blue Ridge Transfer Co, 802 F2d 1532, 1535- 1538 (4th Cir 1986); *United States v Barnes*, 747 F2d 246 (4th Cir 1984).

Fifth Circuit:

United States v Phillips, 664 F2d 971, 999 (5th Cir 1981) *cert den'd* 444 US 827, 100 S Ct 51, 62 L Ed2d 1354 (1982); *United States v Webster*, 750 F2d 307, 338 (5th Cir 1984); *Llewellyn v Stynchcombe*, 609 F2d 194, 195-196 (5th Cir 1980).

Sixth Circuit:

United States v Worthington, 698 F2d 820, 826 (6th Cir 1983); *United States v Ferguson*, 486 F2d 968, 971-972 (6th Cir 1973); *Stone v United States*, 113 F2d 70, 77 (6th Cir 1940); *Stiles v Lawrie*, 211 F2d 188, 189-190 (6th Cir 1954).

Seventh Circuit:

Owen v Duckworth, 727 F2d 643, 646 (7th Cir 1984); *United States v Bruscino*, 662 F2d 450, 457-458 (7th Cir 1981);

United States ex rel Buckhana v Lane, 787 F2d 230, 236 (7th Cir 1986).

Eighth Circuit:

United States v Delaney, 732 F2d 639, 642 (8th Cir 1984); *United States v Robinson*, 756 F2d 56, 59 (8th Cir 1985); *United States v Bassler*, 651 F2d 600, 603 (8th Cir 1981); *United States v Sublet*, 644 F2d 737, 740 (8th Cir 1981).

Ninth Circuit:

United States v Littlefield, 752 F2d 1429 (9th Cir 1985); *Gibson v Clanon*, 633 F2d 851, 855 (9th Cir 1980) *cert den'd* 450 US 1035, 101 S Ct 1749, 68 L Ed 2d 231 (1981); *Bayramoglu v Estelle*, 806 F2d 880, 887- 888 (9th Cir 1986).

Tenth Circuit:

United States v Marx, 485 F2d 1179, 1184 (10th Cir 1973); *United States v Greer*, 620 F2d 1383, 1385 (10th Cir 1980).

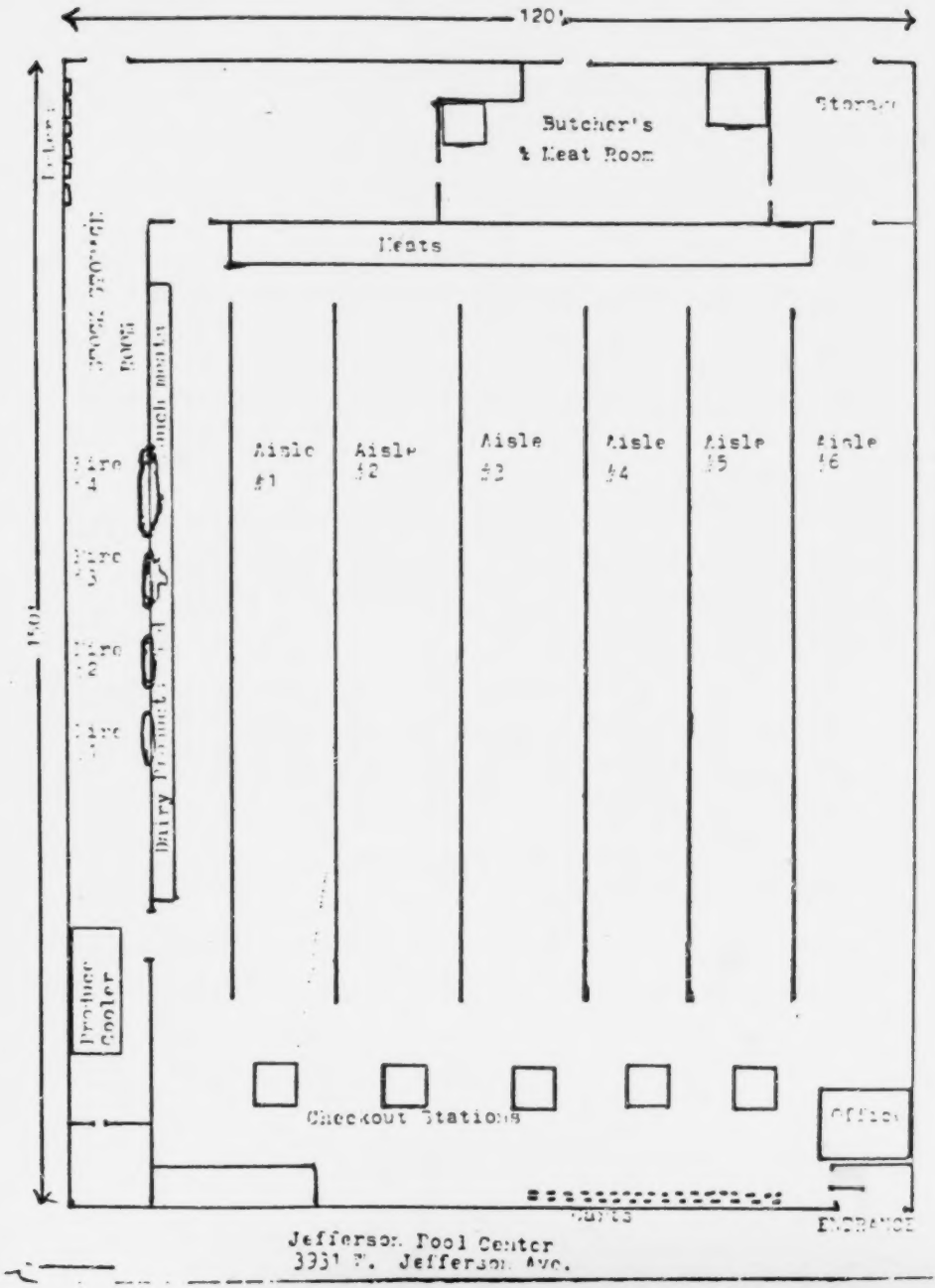
Eleventh Circuit:

United States v Caporale, 806 F2d 1487, 1503 (11th Cir 1986); *United States v Spurlock*, 811 F2d 1461 (11th Cir 1987); *United States v Perkins*, 748 F2d 1519 (11th Cir 1984); *United States v Heller*, 785 F2d 1524, 1528 (11th Cir 1986).

District of Columbia Circuit:

Hobson v Wilson, 737 F2d 1, 46-50 (DC Cir 1984) *cert den'd - US* - , 105 S Ct 1843, 85 L Ed 2d 142 (1985).

Government's Exhibit 50--Diagram of Jefferson Food Center



BEST AVAILABLE COPY

Testimony of Robert McClary (Cross-examination) Vol 8, Tr p 61-64

Q. (by Defense Counsel) And can you tell the jury whether or not this type of ceiling will burn?

A. (Robert McClary) Yes, it'll burn if enough fire is applied to it.

Q. Well, didn't you do a match test at the fire scene and conclude it would not burn?

A. I did my match test with some of the cotton-like insulation that was on top of the -- that was in the ceiling that they used for insulation.

Q. You're talking about another substance; you're talking about insulation?

A. That is correct.

Q. (Long pause.) In any event, sir, isn't it true that this type of material will burn very readily if you hold a match to it?

A. I don't know that it would burn readily by holding a match to it. There'd probably have to be some sustained heat to ignite it.

Q. You mean a match wouldn't be enough to ignite this type of tile, like that (snaps fingers)?

A. I don't think so. You'd probably have to do it in a certain area, or a certain area or something, for a match to do it just like that (snaps fingers).

THE COURT: You're not getting a match, are you?
(Laughter)

MR. BACALIS: Your Honor, I've done this in my office, and I can assure the Court it will not flame up like an accelerant, but I want to demonstrate to the jury through this witness how flammable that tile is.

It will burn, almost like paper.

BY MR. BACALIS:
Q. I'll let you take a piece off with a pair of pliers --- ,

A. Well, like I said earlier, that taking a piece off with a match readily it probably will burn. I'll take a little piece, and I'll put it there, and it will probably flare up.
But I'm saying, if you put a match there, it'll probably do nothing. What I'm saying is that holding a match will probably not do anything.
But if you get the edges here and ignite the edges, of course you're have more burning.

Q. You're saying that this white surface will not burn; is that what you're saying?

A. With a match.

Q. You're saying that?

A. It probably will not.

Q. Let's break a piece off --

A. If the white surface is right there and you hold a match

right there, it probably will not burn.Q. All right. That's what I say, let's break a piece off to demonstrate this to the jury.

A. Do you want me to just do the whole thing?

THE COURT: No.
(Laughter)

A. You don't understand what I'm saying. I'm saying that if it's in place where it is and you hold a match to it -- you take the center out of it and you hold a match there, you probably won't get much penetration of burning.
It'll probably ignite, but it won't start a fire much. But a small piece like this, it probably will. And there's a difference.

BY MR. BACALIS:

Q. All right. Let's do it a different way, rather than run any risk here.

A. I'd rather not.

BY THE COURT: Maybe you could use a trash can.

MR. BACALIS: I'll find some other device.

. . .

Q. The side that's more combustible, I believe you said?

A. I didn't say that one side was more combustible than the other. All I said is it would be difficult to start it with a match from the other side.

Supreme Court, U.S.
FILED
SEP 10 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-29

In the Supreme Court of the United States

OCTOBER TERM, 1987

SABAH SENAWI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

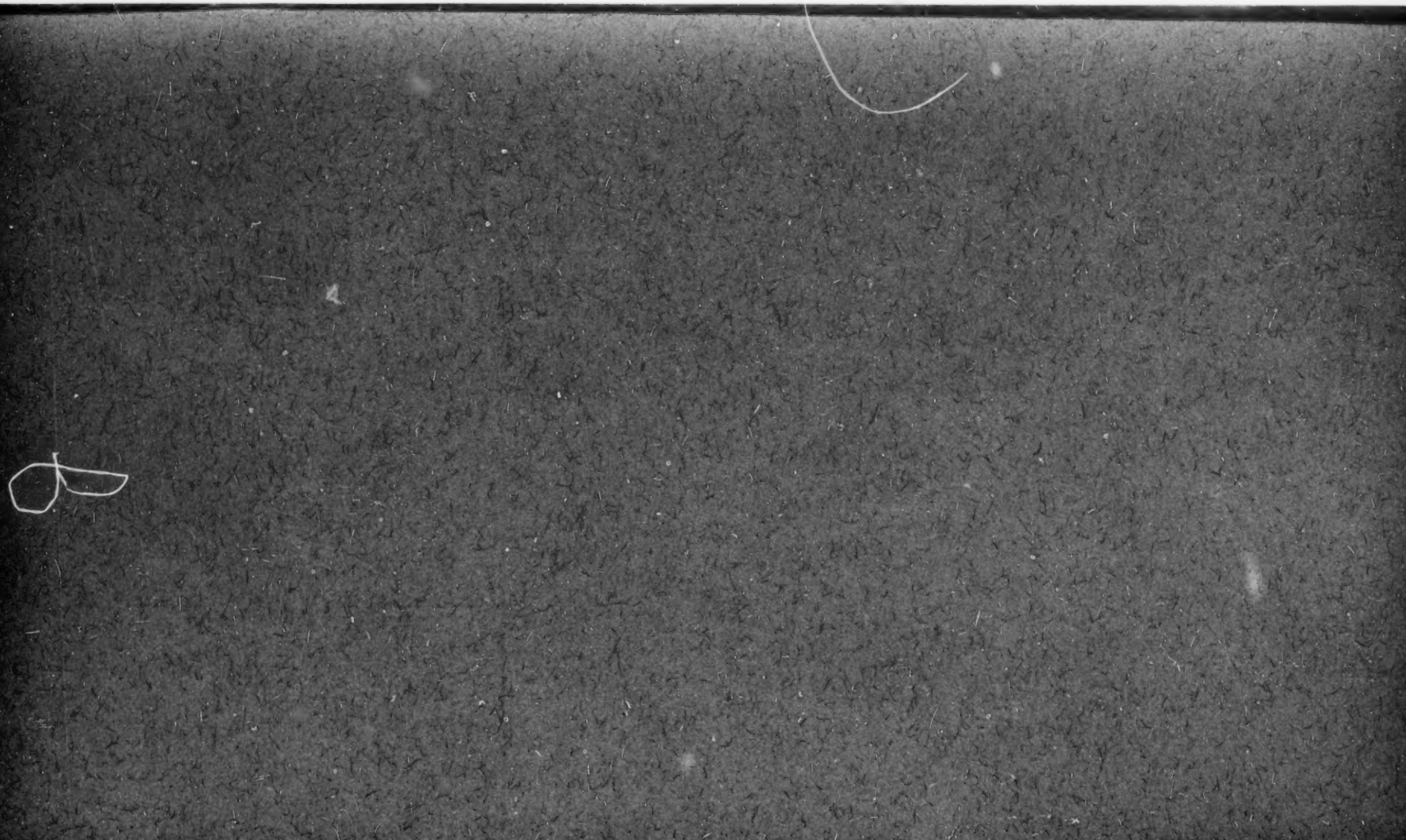
CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

KAREN SKRIVSETH
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

App



QUESTIONS PRESENTED

1. Whether petitioner was prejudiced by the jury's experimentation with an exhibit during its deliberations.

2. Whether the district court properly denied petitioner's motions for a new trial based on newly discovered evidence and on the government's alleged failure to disclose exculpatory evidence.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Mattox v. *United States*, 146 U.S. 140 (1892)	6
Remmer v. *United States*, 347 U.S. 227 (1954)	6, 7
Rushen v. *Spain*, 464 U.S. 114 (1983)	6
Smith v. *Phillips*, 455 U.S. 209 (1982)	6
Tanner v. *United States*, No. 86-177 (June 22, 1987)	6
United States v. *Bagley*, 473 U.S. 667 (1985)	9, 10
United States v. *Pennell*, 737 F.2d 521 (6th Cir. (1984), cert. denied, 469 U.S. 1158 (1985)	6

Statutes and rule:

18 U.S.C. 844(i)	1
18 U.S.C. 1341	1
Fed. R. Evid. 606(b)	5

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-29

SABAH SENAWI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is unreported. The court's judgment is noted at 816 F.2d 683 (Table).

JURISDICTION

The judgment of the court of appeals was entered on April 6, 1987. A petition for rehearing was denied on May 20, 1987. The petition for a writ of certiorari was filed on July 2, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on one count of maliciously damaging a building by fire, in violation of 18 U.S.C. 844(i), and on two counts of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to concurrent terms of four years' imprisonment

on the malicious damaging count and three years' imprisonment on each of the mail fraud counts.

1. On June 11, 1984, at 8:19 p.m., petitioner left work for the day and locked the doors of a grocery store in which he and his mother-in-law each owned a one-half interest (C.A. App. 192). Ten minutes later, the store's burglar alarm system lost power. A subsequent investigation showed that the alarm wires, which were at ceiling level, had burned. *Id.* at 94-95, 193-194. Twenty-four minutes after petitioner left the store, a passerby reported the fire, which the fire department extinguished approximately 40 minutes later (*id.* at 226, 582). Petitioner subsequently submitted insurance claims totalling $850,240.69 based on damages caused by the fire (see *id.* at 3).

At trial, government expert witnesses testified that the fire commenced in four separate places on wooden pallets containing grocery items, which were placed against the interior wall of a storeroom running along the left side of the building (C.A. App. 209, 443, 578, 581-582, 611-625; see Pet. App. 12a (diagram)). The chief of the local fire department testified that he discovered an open, half-empty bottle of lighter fluid on the floor in front of a meat cooler along the back wall of the shopping area. Above, he discovered two grocery items that the fire had not reached; both were covered with a flammable hydrocarbon liquid resembling lighter fluid. C.A. App. 435-436, 439, 445, 598.

Petitioner's expert witness testified that the fire had started hours or even days earlier in faulty wiring on the display case side (not the storeroom side) of the dividing wall. According to that witness, the fire had then spread up the wall on the display side, and had finally burned through the wall to the storeroom, where it ignited the ceiling. Petitioner's witness testified that pieces of the ceiling then fell in the storeroom and started the four individual fires. C.A. App. 376-379, 409-412.

During cross-examination of an arson investigator who was testifying on behalf of the government, petitioner introduced into evidence a ceiling tile similar to those found in the store (C.A. App. 309). The witness agreed with petitioner's counsel that the tile would burn "if enough fire is applied to it" and that the fire in petitioner's store had been hot enough to ignite the ceiling and the wooden grid supporting it (Pet. App. 13a; C.A. App. 313, 317-318)). The witness also stated that he "d[id]n't know that [the ceiling tile] would burn readily by holding a match to it. There'd probably have to be some sustained heat to ignite it" (Pet. App. 13a). Finally, the witness testified that if burning ceiling tiles had fallen and caused fires directly below, he would have expected to see a clean unburned spot under the fallen tile and evidence of fire in many places where the tiles had fallen. According to the witness, no such spots were found after the fire, and there was no evidence of fire in many places where tiles had fallen. C.A. App. 287, 327-328.

During cross-examination of that government witness, petitioner's counsel initially advised the court that he wished to attempt to burn the tile with a match—as he had done in his office (Pet. App. 13a). The government witness testified that a match would "probably flare up" the edge of the tile, but that holding a match directly to the center would not "get much penetration of burning" (*id.* at 14a). Petitioner's counsel did not attempt the demonstration. He stated that he would "do it a different way, rather than run any risk here," and that he would "find some other device" (*id.* at 15a). Petitioner's counsel did not subsequently undertake a demonstration.

2. a. Following his conviction, petitioner filed a motion for a hearing concerning possible jury misconduct (C.A. App. 5-6). Petitioner alleged that there was evidence that jurors had attempted to test, in the jury room, the combustibility of the ceiling tile that had been introduced

into evidence. Examination of the tile revealed a scorch mark that apparently was not present when the tile was introduced into evidence and allowed into the jury room. Petitioner alleged that a combustibility test by the jury during its deliberations constituted an improper introduction of extraneous prejudicial information, which entitled him to a new trial.

The district court denied the motion after a hearing (Pet. App. 7a). The court found (*ibid.*) that any scorching of the tile did not constitute extraneous prejudicial information because the tile had been admitted into evidence and the flammability of the tile did not bear on the "central issue" in the case. At the hearing on the motion, petitioner's counsel declined to explain how the jury experiment could have had any prejudicial impact; counsel instead maintained that prejudice could be determined only after an evidentiary hearing devoted to an examination of the incident (C.A App. 80).

b. Petitioner subsequently filed a motion for a new trial based on newly discovered evidence (C.A. App. 35-43). Petitioner alleged that he had recently learned that the two firemen who first entered the burning building would testify that they had seen only one fire in the storeroom; that a fireman overheard arson investigators at the firehouse saying that they had been successful in stopping fires by Arab-Chaldean businessmen and that the Arab in this case was not going to get away with it; and that a fireman had found the lighter fluid in the fire chief's car and put it in the garbage, from which it was subsequently retrieved. *Id.* at 37-39.

The district court denied petitioner's motion (Pet. App. 8a-9a). The court concluded (*id.* at 8a) that "[t]here is no reasonable probability that * * * [petitioner's proffered] information would have resulted in a different outcome" to the case. The court also found (*id.* at 8a-9a) that the government had not "withheld" the information from peti-

tioner, and the court rejected petitioner's claim that the government had engaged in prosecutorial misconduct.

3. The court of appeals affirmed in a per curiam opinion (Pet. App. 1a-3a). The court held (*id.* at 2a) that although the district court may have erred in declining to hold a hearing to determine whether extrinsic evidence had been introduced, the error was harmless. According to the court (*ibid.*), petitioner had failed to make a sufficient showing of prejudice. The court further found (*id.* at 2a-3a), based on its own "independent review of the record * * * that even if the jury did conduct the experiment and this may have involved introduction of extraneous evidence, [the] evidence was harmless." The court rejected petitioner's other claims without discussion (*id.* at 3a).

ARGUMENT

1. Petitioner contends (Pet. 6-25) that he is entitled to a new trial because the district court failed to hold an evidentiary hearing to consider the impact on the verdict of the apparent effort by the jury to test the combustibility of the piece of ceiling tile that was admitted into evidence. He argues (*id.* at 6-19) that the court of appeals erred in not presuming that the jury's experimentation on the tile had a prejudicial impact on the jury and that the court's decision in this respect conflicts with decisions of other courts of appeals. The decision of the court of appeals, however, is correct, and it does not properly present a conflict among the circuits.

a. No evidentiary hearing was necessary in this case. Both the district court and the court of appeals were willing to assume that the jury had in fact performed an experiment with the ceiling tile during its deliberations. See Pet. App. 2a, 7a. An evidentiary hearing would have added little, if anything, more because, as petitioner concedes (Pet. 18), Fed. R. Evid. 606(b) would have barred

any juror testimony regarding the impact of the experiment on the jury's deliberations. See *Tanner* v. *United States,* No. 86-177 (June 22, 1987), slip op. 8-11; *Rushen* v. *Spain,* 464 U.S. 114, 121 n.5 (1983); see also *Mattox* v. *United States,* 146 U.S. 140 (1892). Petitioner's assertion (Pet. 24) that an evidentiary hearing would not now be an "effective procedure" to determine the prejudicial impact of the experiment was equally true at the time of petitioner's motion.

b. Contrary to petitioner's claim (Pet. 6-19), this case also does not properly present the existing conflict between the Sixth Circuit and other circuits over whether extraneous information introduced into the jury room is "presumptively prejudicial." We agree with petitioner that such a conflict exists. The Sixth Circuit, unlike other circuits, has concluded that the presumption of prejudice established by this Court's decision in *Remmer* v. *United States,* 347 U.S. 227, 229 (1954), is no longer good law in the aftermath of this Court's more recent decision in *Smith* v. *Phillips,* 455 U.S. 209 (1982). We also agree with petitioner that the Sixth Circuit's view is incorrect.[1] This is not an appropriate case in which to address the circuit conflict, however, because a correct reading of *Phillips* would not have altered the result in this case.

First, the jury's experiment with the ceiling tile did not bear on any significant issue in dispute in the case and therefore could not have prejudiced petitioner. At trial, petitioner claimed that the fire had been caused by a fault

---

[1] As we explained in our opposition to the petition for a writ of certiorari in *United States* v. *Pennell,* 737 F.2d 521 (6th Cir. 1984), cert. denied, 469 U.S. 1158 (1985), we believe that the Sixth Circuit has misread this Court's decision in *Smith* v. *Phillips.* We share the view expressed by Judge Celebrezze's dissent in *Pennell* that *Phillips* did not alter the *Remmer* presumption that extrinsic influence on the jury is prejudicial; rather the Court simply stressed, consistent with *Remmer* (see 347 U.S. at 229), that the presumption was not conclusive and it was not a substitute for a showing of actual bias. See U.S. Br. in Opp. at 7, *Pennell* v. *United States, supra.*

in the electrical wiring and that burning ceiling tiles had spread the fire to three separate areas in the store through "fall-down" (Pet. 3). The government did not attempt to rebut this defense by suggesting that the ceiling tiles were not combustible. A government expert agreed that the ceiling tiles were combustible and that the ceiling had caught fire (C.A. App. 316-319). Other government witnesses agreed that ceiling tiles had been burned in the fire (see, *e.g.*, *id.* at 232, 233-236). The dispute at trial focused on how the fire was caused, not on where it had spread.[2]

In any event, even if the jury experiment with the tile had a sufficient bearing on a genuine issue of material fact to trigger the presumption of prejudice under *Remmer,* the court of appeals' failure to apply that initial presumption would not provide a ground for reversal in this case. The court of appeals' inquiry into actual prejudice resulted in a determination that would have rebutted any such presumption. As the court of appeals observed (Pet. App. 2a-3a), one of the witnesses at trial intimated that such an experiment would not simulate actual fire conditions; he agreed that the fire would have been sufficient to ignite the tile, but he also stated that a match could not ignite the

---

[2] The government's evidence that arson was the cause of the fire was principally: (1) the close proximity in time between petitioner's departure from the store and the start of the fire (C.A. App. 94-95, 192); (2) the presence of a container of lighter fluid and flammable liquid on certain products (*id.* at 435-436, 439, 445, 498); (3) the absence of any clean (unburned) spots on the bottom of the ceiling tiles that had landed on the floor (which a government witness testified undercuts petitioner's claim that the ceiling tiles had started the four separate fires) (*id.* at 326-327); (4) the absence of any signs of fire in other locations where tiles had fallen (*id.* at 287); and (5) petitioner's motive (outstanding debts and his subsequent insurance claims) (see *id.* at 2-3). One government witness did maintain that the fire was not in progress long enough "to travel from one area, go along the ceiling, fall down, pick up, travel over to another area, fall down, travel and then go over to another area" (*id.* at 620).

center of the tile.[3] Contrary to petitioner's claim (Pet. 24), therefore, even if the jury was considering "how readily the ceiling tile could be ignited," the jury is unlikely to have attached any meaningful weight to its experiment.

2. Petitioner also contends (Pet. 25-29) that he should have been granted a new trial because the government failed to disclose exculpatory evidence and because of petitioner's discovery of new evidence after the trial (*ibid.*). The court of appeals correctly rejected this claim.

a. As the district court found (Pet. App. 8a-9a), the government did not withhold any exculpatory information from petitioner that warrants a new trial. First, the district court specifically found (*id.* at 8a) that petitioner had prior knowledge of the identity of the two witnesses (the two firemen who first arrived at the fire) who petitioner claims would have provided exculpatory testimony. Petitioner therefore could have himself obtained their testimony prior to trial. Second, as the district court further found (*ibid.*), any statements obtained by the government from these witnesses that were not turned over to petitioner were not exculpatory. As the government represented to the court of appeals, the government provided a copy of Van Horn's written statement to petitioner's counsel prior to trial, and neither Van Horn's written or oral statement nor Agee's oral statement addressed the issue whether either witness had seen one or more fires. See C.A. App. 109 (Agee).

In any event, even assuming that the statements of the two witnesses currently proffered by petitioner had previously been in the government's possession and had then been withheld from petitioner, they still would not be

---

[3] This testimony was provided during petitioner's cross-examination of a government witness and not, as the court of appeals mistakenly stated (Pet. App. 2a-3a), by one of petitioner's witnesses.

"material" because there "is [no] reasonable probability that had the evidence been disclosed to the defense, the result of the proceedings would have been different." *United States* v. *Bagley*, 473 U.S. 667, 682 (1985). According to the transcripts upon which petitioner relies (C.A. App. 96-109, 659-668), the two firemen would testify that they saw only one fire, which was on the storage side of the partition, and not on the display side. The significance of their noticing only one fire, however, is undercut by their testimony concerning the poor visibility at the scene (*ibid.*).

In addition, contrary to petitioner's assertion (Pet. 23), Van Horn did not testify that "the fire appeared to start from electrical causes"; he disclaimed any view on the cause of the fire. And, although Agee did state his view that the fire was caused by a "shorting out," his opinion was expressly premised on the fact that he could "see no other way that a fire [could] start on a pallet like that" (C.A. App. 102). The possibility of arson, however, plainly contradicts that premise.

Finally, as the district court concluded (Pet. App. 8a), the proffered testimony actually "continues to support the government's case." In particular, both firemen testified (C.A. App. 98, 663, 666) that the fire was located in the storage room and not in the display room. That testimony directly contradicts the theory of petitioner's expert, who testified that the fire commenced on the display room side of the dividing wall (see C.A. App. 376-379, 409-412).

b. Similarly unpersuasive is petitioner's claim (Pet. 27-29) that he is entitled to a new trial based on newly discovered evidence. New evidence that the fire chief stored the container of lighter fluid in his car overnight and had to have the container retrieved from the garbage the next day does not dispute the key aspect of his testimony, which was that he found the container at the scene. Nor does the new evidence cast doubt on the further

damaging testimony that two grocery items covered with a flammable hydrocarbon liquid resembling lighter fluid were discovered near the container. See C.A. App. 445, 598.

New evidence that one of the government's witnesses had previously made a statement concerning the commission of arson by "Arab-Chaldean businessmen" (C.A. App. 39) likewise falls short of that necessary to call for a new trial, which requires at least a " 'reasonable probability' " of acquittal (cf. *United States* v. *Bagley*, 473 U.S. at 682). Such remarks, even if they were made, would not significantly reduce the credibility of that witness's conclusion that arson caused the fire because, as petitioner admits,[4] that conclusion was corroborated by the testimony of numerous other expert witnesses.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

KAREN SKRIVSETH
Attorney

SEPTEMBER 1987

---

[4] See Pet. 3 & n.3 (citing C.A. App. 209-210 (Lewis); *id.* at 578 (Silvani); *id.* at 443 (Parker); *id.* at 604, 624-625 (Tackett); *id.* at 264, 286, 288 (McClary); 7 Tr. 32 (McClary)) ("The Government's witnesses stated that the fire did not spread by burning along the ceiling or igniting separate areas as burning materials fell down.").

U.S. GOVERNMENT PRINTING OFFICE: 1987—181-483/60019